The Concept of Unilateral Divorce in Nigeria: Reviewing *Bibilari v Bibilari*

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Abstract

This paper examines the decision in Bibilari's case, particularly as it relates to the issue of unilateral divorce and custody of children in divorce cases. The paper reveals that the no-fault/unilateral divorce theory, which is a radical departure from the matrimonial offence theory, could, as exemplified by Bibilari's Case lead to harsh effects. The paper recommends an amendment to the law and an adoption of a procedure requiring a petitioner to furnish proof that he/she had indeed tried to save the marriage. The paper further appraises the personality and character of spouses' principle in determining custody as applied in Bibilaris's case and enjoins the adoption as one of the determinants of custody in divorce cases.

1. Introduction

All over the world, the institute of marriage is one, which is regarded as sacred in both religious and secular circles. Prior to the 20th century, marriage was not only sacred but also indissoluble. Dissolution of marriage was regulated by the ecclesiastical courts of England and was almost impossible. Where necessary, it was granted as a result of manifestly grave misconduct by a spouse usually in the form of adultery and sometimes, cruelty and desertion. This was referred to as the matrimonial offence/fault theory and it was founded on the premise that only an 'innocent' spouse could bring a petition for dissolution of marriage against a

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'guilty' spouse, usually one, who had committed a matrimonial offence like adultery.

With the 20th century came a slow but steady movement away from the fault-based matrimonial offence theory. Proponents of the movement described the fault theory as one, which generated rancour and caused grave emotional, psychological and financial damage to spouses and children of marriages. [1]

> … This (*fault theory*) resulted in unhappy marriages whose partners could not achieve termination, an inordinate amount of court time devoted to divorce cases, "expensive divorce proceedings," and a legal system in which individuals told lies and behaved disingenuously.

Critics of the fault theory advocated for a shift from trying to determine the guilt or innocence of a spouse upon the breakdown of a marriage to trying to determine whether or not a marriage had indeed broken down. Named the irretrievable breakdown theory, the new theory was premised on the fact of the death or breakdown of a marriage and not the cause of such breakdown. Courts no longer concerned themselves with the guilt or innocence of the parties, rather they attempted to determine whether or not a marriage had broken down irretrievably, such as to give an empty shell of a marriage a decent burial with fairness and less bitterness.[2] This theory was lauded as making divorce easier.

Divorce legislation promulgated after the advent of the irretrievable breakdown theory took two forms. Some adopted the no-fault irretrievable breakdown theory to the exclusion of the

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1 G. Wright and D. M. Stetson "The Impact of No-Fault Divorce Law Reform on Divorce in American States," *Journal of Marriage and the Family*, 40 (3), (1978), 575-580 at 575.

2 I.P. Enemo, *Basic Principles of Family Law in Nigeria*, (Ibadan: Spectrum Books Limited, 2008), p. 155.

matrimonial offence theory[3] while others found a compromise by adopting the irretrievable breakdown theory while retaining some of the provisions based on the old matrimonial offence theory.[4]

In 1970, with the promulgation of the Matrimonial Causes Act of 1970,[5] Nigeria took the midway solution by adopting both the fault and no fault theories. It provided in s. 15 for the dissolution of marriage based on the sole ground of irretrievable breakdown:[6]

> A petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.

In the following subsection, it provided eight factual situations one or more of which *must* be proved to show that a marriage has broken down irretrievably.[7]

Section 15(2)(a)-(d) and (g)-(h) contain the fault provisions with factual situations providing for matrimonial offences like wilful and persistent refusal to consummate the marriage,[8] adultery and intolerability,[9] intolerability *simplicite*r,[10] desertion,[11]

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3 New Zealand, s. 39, Family Proceedings Act, 1980

4 United Kingdom, s. 1, Matrimonial Causes Act 1973; Australia: S. 28 Matrimonial Causes Act 1959.

5 Cap 18, Laws of the Federation, 1970. It has since been amended as The Matrimonial Causes Act Cap M25 Laws of the Federation of Nigeria 2004 (hereinafter referred to as 'the Act').

6 *Ibid.*, s. 15(1).

7 *Ibid.*, s. 15(2)(a)-(h).

8 *Ibid.*, s. 15(2)(a).

9 *Ibid.*, s. 15(2)(b).

10 *Ibid.*, s. 15(2)(c).

11 *Ibid.*, s. 15(2)(d).

non-compliance with a decree for restitution of conjugal rights[12] and absence leading to presumption of death.[13]
The no-fault theory is encapsulated in subsections (e) and (f), described as the 'separation' or 'living apart' provisions, reproduced below.

> 15(2) The court hearing a petition for a decree of dissolution of marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts-
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> (a) – (d);
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> (e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted; 'two-year living apart'
>
> (f) that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition....

Though jointly referred to as the 'living apart' provisions, some differences exist between subsections (e) and (f). Whereas the first living apart provision in subsection (e) provides for a continuous separation period of at least *two years*, the second provision provides for a continuous separation period of at least *three years*.

The second and perhaps the most important difference lies in the fact that the two-year living apart provision requires the consent or lack of objection of the respondent while the three year living apart provision does not. This simply means that where the two-year living apart provision provides for a no-fault

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12 *Ibid.*, s. 15(2)(g).
13 *Ibid.*, s. 15(2)(h).

mutual/consensual divorce (i.e. divorce requiring the consent of both spouses), the three-year living apart provision provides for a no-fault *unilateral divorce* (i.e. divorce requiring the consent of only one spouse).

Several authors have stated that the no-fault spirit of the living apart provisions constitutes a radical departure from the matrimonial offence theory.[14] The concept of unilateral divorce shows that a party may divorce his/her spouse against his/her will if such party satisfies a minimum period of continuous separation from the said spouse.[15]

The unpleasant implication is that a 'guilty' spouse may divorce an 'innocent' spouse without his/her consent simply by staying away from the matrimonial home for the required separation period.

Countries,[16] the world over, in a bid to make divorce easier, have adopted this unilateral divorce theory and over the years, the minimum separation period has dwindled from a daunting ten-year period to an alarmingly easy one-year period causing not only a steady hike in divorce rates[17] but also a decline in marriage rates *Bibilari v Bibilari* [18] in these countries.

The case of[19] clearly illustrates the harsh effects of the unilateral divorce provision encapsulated in section 15(2)(f) of the Act.

2. Facts of the case

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14 Enemo, above note 2 at p. 200

15 Leora Friedberg: "Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data," (1998), *American Economic Review* 88(3) p.9 available at http://www.nber.org/papers/w6398.pdf? New_ window=1 accessed on 25/09/2013.

16 Australia, Belgium, New Zealand, United Kingdom, United States, Canada, etc.

17 Begium, Canada, United States, New Zealand, etc.

18 United States, Canada.

19 SUIT NO: FCT/HC/PET/175/11.

The husband/petitioner, Dr. Adeyinka Bibilari, (hereinafter referred to as H) and the wife/respondent, Mrs. Ngozika Bibilari (hereinafter referred to as W) got married in 1990. 23 years later, in August, 2011, H sought, amongst other orders,[20] a decree for dissolution of marriage on the ground of irretrievable breakdown of the marriage and relying on the unilateral divorce provision in section 15(2)(f) on the Act. He contended that they (H and W) had lived apart for a continuous period of five years preceding the presentation of the petition and that he had therefore satisfied the only requirement of that section.

W by a preliminary objection alleged that H sought dissolution of the said marriage earlier, citing W's intolerable behaviour as the factual situation in proof of irretrievable breakdown of the marriage.[21] The earlier case was struck out at the trial court and dismissed at the Court of Appeal for failure of the petitioner/appellant/husband to discharge the standard of proof stipulated by the Act. Both courts held that H failed to establish to the satisfaction of the courts W's conduct to him, which a reasonable person could not be expected to live with. W therefore contended that the present proceedings constituted an abuse of court process. In a bench ruling delivered in April, 2012, the court dismissed the preliminary objection for lack of merit. Subsequently, W filed an amended answer in March 2013, contesting the petition and seeking custody of the last child of marriage.

The issues as delineated by the court were as follows:

(i.) whether, having regard to the evidence adduced before this Court, the marriage between the Petitioner and the Respondent has broken down irretrievably to warrant the grant of a decree of dissolution of the marriage; (*Issue*

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20 He also sought an order granting him custody of the children of the marriage and other orders as the court may make.

21 *Bibilari v Bibilari*, (2011) 13 NWLR (Pt. 1264) 207.

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(ii.) if the answer to Issue One above is in the affirmative, who as between the Petitioner and the Respondent should be given custody of 7-years old Miss Durotimi Bibilari.'[22] (*Issue Two*)

Issue one forms the subject of this paper. Counsel for H contended that H found W to be cantankerous, causing him to flee the matrimonial home in May 2006 and that the parties had lived apart since then. This therefore brought the separation period to well over 5 years. Counsel for W, while in agreement that the parties had lived apart for 5 years, stated that W had lived in peace and harmony with her husband and the members of their extended family and was surprised when H not only chose to vacate their matrimonial home but also threw out all the inhabitants therein, locked the house up and made away with their children while she was abroad receiving medical treatment.

Counsel for H maintained that of utmost importance was the fact that the parties, having lived apart for a continuous period of five years had fulfilled and exceeded the three-year continuous separation requirement provided for in section 15(2)(f) and the court was therefore bound to grant a decree for dissolution of the marriage.

Counsel for W argued that the living apart provisions were subject to the absolute and discretionary bars which are provided for in sections 26 and 28 of the Act. In particular, he pled that the absolute bars of condonation and connivance should be applied to the present case to prevent the court from granting a decree of dissolution of marriage in favour of H. He argued further that since H's conduct led to the separation, H should not benefit from his actions, which amounted to constructive desertion as provided for in section 18 of the Act.

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22 *Bibilari v Bibilari*, above note 19 at p. 4.

3. Court's analysis and holding

In its judgment, the court first outlined the provisions of section 15 of the Act, highlighting the sole ground for dissolution of marriage and the eight factual situations necessary to prove this ground. Subsequently, relying on the cases of *Omotunde v Omotunde*[23] and *Ajidahun v Ajidahun*,[24] he briefly described section 15(2)(f) as a non-fault provision which mandates the court to grant a decree of dissolution of marriage once the statutory requirement of a continuous three-year separation period had been fulfilled. He found that the parties had fulfilled this requirement. The court held: [25]

> The evidence adduced before me reveals that the Petitioner and the Respondent are *ad idem* that they have lived apart since 7/5/06. The disagreement between them relates only to the circumstances that led to their 'living apart.'

In response to W's counsel argument for the application of constructive desertion, he stated as follows: [26]

> With great respect to learned counsel for the Respondent, section 18 of the MCA does not come into play at all in the circumstances implicated in the instant case. The section deals with a situation in which one spouse by his misconduct forces the other spouse to leave the matrimonial home whilst he/she remains there. That is what "constructive desertion" means, and the party who is so compelled to leave the matrimonial home may seek dissolution of marriage on the basis of desertion under section 15(2)(d) notwithstanding that it is he/she who physically left other spouse in the matrimonial home

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23 (2001) 9 NWLR (pt. 718) 252 at 284.
24 (2000) 4 NWLR (pt. 654) 605 at 612.
25 Above note 19 at pp. 4-5.
26 *Ibid.*, at p. 7.

> because the conduct of the guilty spouse is such as to justify the petitioner's withdrawal from the matrimonial home. Quite clearly, this is not such a case.

He further rejected the argument for the application of absolute and discretionary bars to petitions for dissolution of marriage: [27]

> It does not seem to me that sections 26 (relating to condonation and connivance) and 28 (dealing with the discretionary bars) are applicable.… The essence of condonation and connivance is misconduct on the part of the respondent which the petitioner has either forgiven and reinstated or consented, encouraged or wilfully contributed towards, even as the preponderance of juristic opinion is that the discretionary bar in s. 28 does not operate in relation to 'living apart' which is a non-fault provision. See Itse Sagay, Nigerian Family Law (Lagos: Malthouse Law Books, 1999), p. 395. It cannot be otherwise because subjecting a non-fault provision founded on living apart simpliciter to the court's discretion would have the undesirable effect of converting the provision to a fault-prone one contrary to the clear intention of the lawmaker. The argument of learned counsel for the Respondent in this regard ought to be rejected, and I hereby reject it.

After careful consideration of the arguments of counsel for both parties as well as evidence of the parties who testified for themselves calling no other witnesses, the court held that by virtue of the section 15(2)(f) and the decisions in *Omotunde v Omotunde*[28] and *Ajidahun v Ajidahun*[29] the marriage had broken

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27 *Ibid.*, at pp. 7-8.

28 Above note 23.

29 Above note 24.

down irretrievably: [30]

> … I cannot but hold that the marriage between the Petitioner and the Respondent has broken down irretrievably on the basis of living apart since 7/5/06 for a continuous period of over five (5) years immediately preceding the presentation of the petition on 8/7/11. Issue One is accordingly resolved in the affirmative in favour of the Petitioner and against the Respondent.

4. Case Review

The court's analysis and consequent judgment show a clear, concise and straightforward application of the law to the present case. The courts' decision to grant the decree sought by H was predicated on the fact that the unilateral divorce provision contained in section 15(2)(f) specifically states that a party may divorce his spouse irrespective of the spouse's consent if they have lived apart for a continuous period of at least three years. The rationales for rejecting the arguments (for the application of constructive desertion and the absolute and discretionary bars) put forward by learned counsel for W were sound and well articulated.

Firstly, section 18 of the Act, which provides for constructive desertion, reads as follows:

> A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.

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30 Above note 19 at pp. 8-9.

This simply means that this section applies to cases where a party is forced to leave the matrimonial home as a result of the conduct of his/her spouse such that the party that remains in the matrimonial home and not the party that leaves becomes the real deserter.[31] This section can only be applied to the *Bibilari's* case if W left the matrimonial home (instigating the separation/living apart) as a result of H's misconduct and W's counsel sought to either sustain a divorce petition for W claiming H's desertion or defend a divorce petition against W for desertion. This is clearly not the case here and as such, as, the learned judge rightly concluded, this section cannot apply to this case.

Secondly, sections 26 and 28 provide for the absolute and discretionary bars mentioned by W's counsel. Bars to petitions for divorce have been defined as factual situations which when proved will cause a court to dismiss a petition for dissolution of marriage irrespective of the fact that a petitioner has proved the fact(s) he relied on.[32] There are two types of bars: absolute and discretionary bars. The absolute bars, provided for in sections 26 and 27, are condonation, collusion and connivance. Simply put, a decree for dissolution of marriage will not be granted if the petitioner has condoned (forgiven) or connived at the conduct complained of or has been guilty of collusion with intent to cause a perversion of justice. Proof of an absolute bar mandates a court to dismiss a petition for dissolution of marriage.[33] The discretionary bars provided for in section 28 are petitioner's adultery, petitioner's desertion and petitioner's conduct conducing to the commission of a matrimonial offence. Proof of a discretionary bar clothes the court with discretion to either dismiss a petition or grant a decree for dissolution.

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31 Enemo, above note 2 at pp. 194-195; E.I Nwogugu, *Family Law in Nigeria*, (Ibadan: Heinemann Educational (Nigeria) Plc, 2001), pp. 182-183.

32 Enemo, above note 2 at p. 213 .

33 *Ibid.*

From the above, it is clear that all bars (whether absolute or discretionary) are dependent on misconduct - in the form of a matrimonial offence - of the petitioner, which prevents him/her from acquiring a decree for dissolution of marriage even after he has successfully proved the fact or facts he relied on. The bars therefore applied under the old matrimonial offence/ fault theory.

The living apart provisions however are fault-free provisions. They are dependent not on the cause of the breakdown of marriage or the 'guilt' or 'innocence' of the spouses but on whether or not the marriage had indeed broken down. The bars therefore cannot apply to the living apart provisions. Many learned scholars have commented on the applicability of the bars to the living apart provisions. In the words of Enemo: [34]

> Once it is clear that the parties have lived apart for the statutory period … the fault of the party who created the situation that necessitated the living apart is irrelevant.

According to Nwogugu, the application of absolute and discretionary bars to petitions for dissolution of marriage based on the living apart provisions as evidence of breakdown is 'clearly inappropriate.'[35] 'As separation is based on a fault-free concept, there will no relevant offence to connive at or condone.'[36] Sagay[37] was also of the same view. Case law has also supported the theory that the living apart provisions are not subject to the bars to the petition for divorce. In *Omotunde v Omotunde*,[38] the court stated thus:

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34 *Ibid.*, at p. 201.

35 Nwogugu, above note 31 at p. 204.

36 *Ibid.*, *Tagbo v Tagbo* Suit No. OY/ID/71 of 10/11/71.

37 I. Sagay, *Nigerian Family Law* (Lagos: Malthouse Law Books, 1999); A.B. Kasumu, "The Matrimonial Causes Decree 1970: A Critical Analysis," *Nigerian Journal of Contemporary Law*, Vol. 2. No. 2 pp. 171-174.

38 Above note 23.

> By section 15(2)(f) of the Act, a court hearing a petition for the dissolution of a marriage shall hold the marriage to have broken down irretrievably if the parties to the marriage have lived apart for a continuous period of three years immediately preceding the presentation of the petition. The law is that the provision is mandatory and the court has no discretion to exercise. The section has the factor of absence of fault element characteristic of other matrimonial offence – the law behind the section that is s. 15(2)(f) as far as the living apart is concerned is not interested in right or wrong or guilt or innocence of the parties. Once the parties have lived apart, the court is bound to grant a decree.'

It is quite clear that the Act makes no provision for exceptions or limitations to the living apart provisions. The learned judge therefore was correct in his decision to grant the decree for dissolution of the marriage. However, a most striking statement by the court in this writer's opinion detracts from the spirit of the no-fault provision:[39]

> Issue One (*whether or not a decree for dissolution of marriage on the grounds of irretrievable breakdown based on the living apart provision in section 15(2)(f) should be granted* [40] is accordingly resolved in the affirmative in favour of the Petitioner and against the Respondent.

This statement raises the presumption that one party is right 'in favour of the Petitioner' and the other is wrong 'against the Respondent.' This hardly denotes the faultless, no innocent/guilty or right/wrong party spirit of the 'living apart' provisions. The

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39 Above note 19 at p. 8-9.

40 *Emphasis mine*.

writer suggests that a more neutral statement be applied in the future. I dare say that the learned judge may have stopped at '… resolved in the affirmative …;' his message was already clear.

5. Law Review

Having lauded the court's judgment in the case above, the writer would like to highlight the fact that the law itself in relation to the living apart provisions is inadequate.

5.1 Living apart/Separation period

This writer advocates for re-assessment of the minimum separation period provided for in section 15(2)(f). Three years is a short period to determine if a marriage has indeed broken down irretrievably. Many a recalcitrant spouse may abuse this provision and abandon a marriage without attempting to save it simply because this provision is available, thereby; weakening the institution of marriage which is held in Nigeria in very high esteem. One must call to mind the fact that the essence of the two-year rule banning the institution of petitions for dissolution of marriage within two years of the marriage[41] is to prevent parties from rushing in and out of marriage at will.[42] Enemo[43] states that the rule encourages tolerance and reconciliation as the aggrieved party must wait for two years to be able to institute a petition. A living apart provision founded on a three-year separation period may therefore detract from this idea. In the words of Nwogugu, [44] who advocates for a five-year separation period:

> The period seems rather short in view of the fact that an innocent spouse may be divorced against his or her will on this fact. A longer period than the three years described

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41 See s. 30 of the Act.

42 *Fisher v Fisher* (1948) 83 *Cal. App*., p. 263-264, in Enemo, above note 14 at p. 211.

43 Enemo, above note 2 at p. 211.

44 Nwogugu, above note 31 at p. 194.

> in subsection (f) will be necessary to show adequately that the marriage has broken down.

To ram this point home, one must mention that the Nigerian Matrimonial Causes Act which was modelled after the English Divorce Reform Act of 1969, now the Matrimonial Causes Act 1973 (c.18) (hereinafter referred to as 'the UK Act') failed to take into consideration the fact that section 1 of the UK Act which provides for the dissolution of marriage citing irretrievable breakdown as the sole ground for dissolution and listing five facts with which to prove this ground provides for a five year separation period: [45]

> 1(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—
>
> (a)…..
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> (e) that the parties to the marriage have lived apart for a continuous period of at least *five*[46] years immediately preceding the presentation of the petition (hereafter in this Act referred to as *"five years' separation"*).

Several countries all over the world have in recent times shortened the separation periods provided for in their living apart provisions with dire consequences. Belgium in its 1974 divorce legislation required a minimum separation period of ten years, this period has dwindled over the years to a one-year separation period contained in its 2007 divorce legislation; as a result their divorce

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45 S. 28 (m) Matrimonial Causes Act 1959 of Australia.

46 Emphasis mine.

rates have risen.[47] The US[48] and Europe,[49] with separation periods ranging from six months to two years have recorded a rise in divorce rates while the US has recorded an extra decline in the rate of marriage.[50]

This writer submits that the harsh effects of the unilateral divorce provisions far outweigh its advantages especially with the application of short separation periods. I therefore recommend the amendment of s. 15(2)(f) to change the minimum separation period to five years.

5.1 Exceptions/Limitations to the living apart provisions

As case law and legislation in Nigeria clearly show, there are no limitations to the application of the living apart provisions. However, in the interest of public policy, there must be a system of checks and balances. In view of the fact that the section 15(2)(f) is essentially a no-fault provision, one is bound to overlook previous conduct of the spouses but one must also consider the possible consequences of the dogged application of this section on the interests of the deserted spouse and children of the marriage, the institution of marriage and society in general.

Over time, some have taken the view that courts should have the discretion to refuse to grant a decree for divorce if these interests are not adequately protected. This discretion was

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47 Sieste Bracke, "Making Divorce Easier: The Role of No-Fault and Unilateral Revisited," (2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101056 accessed on 24/09/2013.

48 Friedberg, above note 14, pp. 2, 17; Jonathan Gruber, "Is Making Divorce Easier Bad for Children? The Long Run Implications of Unilateral Divorce," (2004) *Journal of Labor Economics*, 22(4).

49 L. Gonzalez and T.K. Viitanen "The Effect of Divorce Laws on Divorce Rates in Europe," (2009) *European Economic Review* 53 (2), 127.

50 Imran Rasul, "The Impact of Divorce Laws on Marriage," (2003) available at http://dev3.cepr.org/meets/wkcn/3/3519/papers/Rasul.pdf accessed on 25/09/2013.

canvassed to apply to petitions for dissolution of marriage including those founded on the living apart provisions. Most legislation have made provisions for the power of court to refuse to make a decree *nisi* absolute until adequate provisions have been made for the daily care and maintenance of the children of the marriage especially children under 16 years.[51] However a proactive provision is found in section 5 of the UK Act.

> 5. Refusal of decree in five-year separation cases on grounds of grave hardship to respondent.
> (1) The respondent to a petition for divorce in which the petitioner alleges five years' separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

This provision empowers the court to dismiss a petition for dissolution after a petitioner has proved that the parties have lived apart for five years if the respondent can show that such dissolution will cause grave hardship (financial and other wise) to him/her. It therefore serves as a limitation to the five-year living apart provision[52] as it goes beyond granting the court the power to grant a decree *nisi*, however leaving the decree absolute contingent upon the provision of a proposal for adequate arrangements for the children of the marriage, etc,[53] but further empowers the court to dismiss a successfully proven petition based on the five-year separation provision if such dissolution will cause hardship to the other spouse/respondent.

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51 UK Act.
52 S. 1(4) of the UK Act.
53 See, s. 57 of the Act.

The section also makes provision for different types of hardship, mentioning financial and other hardship. It goes a step further to include as an example of hardship, the loss of the chance of acquiring any benefit, which the respondent might acquire if the marriage were not dissolved.[54]

Case law expounds on the provisions of this section. The application of section 5 based on potential financial hardship to the respondent was illustrated in the case of *Lee v Lee*.[55] In that case, the parties were married in 1930. They separated in 1948, W remaining in the matrimonial home ... H sued for a divorce under section 2(1)(e) of the 1969 Act (*five year separation provision*). He proposed giving W GBP 5 per week, GBP 200 to compensate for loss of widow's pension and GBP 5,000 as the estimated half share of the proceeds of the sale of the matrimonial home. W opposed this on the grounds that it would cause financial or other hardship; the son who was seriously ill required constant attention from W and the son's house was too small to accommodate W, GBP 5,000 was insufficient to buy a one-roomed flat in the area and accommodation close by might be difficult. The petition was accordingly dismissed.[56]

The courts may however grant the decree if the petitioner is able to provide enough for the respondent to mitigate the possible hardship the dissolution would cause as was the case in *Parker v Parker*[57] and *K v K* (Financial Relief: Widow's

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54 s. 5(3); In *K v K* (Financial Relief: Widow's Pension) (1997) 1 F.L.R. 35; *Parker v Parker* (1972) 1 All E.R. 410.

55 (1973) 117 S.J. 616.

56 Case analysis available at http://login.westlaw.co.uk/maf/wluk/app/document?&srguid=ia744d05f0000014168021c5e2bf36b38&docguid =I6FC85DA0E43611DA8FC2A0F0355337E9&hitguid=I6FC85DA0E43611DA8FC2A0F0355337E9&rank=110&spos=110&epos=110&td=131&crumb-action=append&context=12&resolvein=true

57 Above note 54.

Pension).[58]

An example of "… grave… other hardship" was illustrated in the case of *Banik v Banik*.[59] The petitioner/husband who lived in the United Kingdom sought a decree for dissolution of marriage relying on the five-year living apart provision. The respondent/wife contended that as she lived in a predominantly Hindi society in India, she would suffer grave hardship as a result of the stigma attached to divorcees. The court found in her favour and denied the petition for dissolution sought by the petitioner/husband.

Circumstances, which the court may consider before exercising this discretion, include interests of the parties to the marriage, interests of the children of the marriage, conduct of the parties etc, thereby ensuring that the interests of all the parties concerned and not just that of the petitioner are adequately protected.

From the above, it is clear that the UK Act provides adequately for the interests of the would-be abandoned spouse. It ensures that a spouse divorced against his/her will does not suffer hardship as a result of such divorce. This type of provision is especially necessary in a male-dominated society like Nigeria. Many women leave their day jobs at the behest of their husbands to take care of the home and many have found themselves in dire straits when these husbands 'abandoned' them 'legally,' relying on the living apart provisions. Consequently, many have lost custody battles as a result of the inability to adequately provide for their children.[60]

The *Bibilari* case is a clear example. Mrs. Bibilari worked for the Nigerian Civil Service prior to her marriage to Dr. Bibilari. Upon her marriage, she left her job and assumed a managerial

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58 Above note 54.

59 (1973) 3 All ER 45.

60 *Nzelu v Nzelu* (1997) 3 NWLR (Pt. 494), p. 472; *Ihonde v Ihonde* SUIT No. WD/85/70 of 17/4/72; *Dawodu v Dawodu* (1976) CCHCJ 1207.

position in one of her husband's companies. In 2006 when Dr. Bibilari abandoned their matrimonial home, he also repossessed the managerial position erstwhile occupied by his wife. The result was that when Mrs. Bibilari returned from her trip abroad for medical treatment, she had no home and no job and was forced to let her sons remain with their father, as she could not adequately provide for them.

Worthy of comment is section 25 of the Act which contents seem to protect the interests of the respondent:

> On the application of the respondent made in the course of proceedings for a decree of dissolution of marriage, the court may, if it considers it just and proper in the circumstances of the case to make provision for the maintenance of the respondent or other provision for the benefit of the respondent, refuse to make a decree unless and until it is satisfied that the petitioner has made arrangements satisfactory to the court to provide the maintenance or other benefit as aforesaid upon the decree becoming absolute.

A careful perusal of this section shows the power of court, during the pendency of divorce proceedings, to make provision for the maintenance of the respondent or any order for the benefit of the respondent and to refuse to make a decree of dissolution until a petitioner satisfactorily complies with the order. Though similar to section 5 the UK Act, (it is for the benefit of the respondent) the provision is vague and ambiguous to say the least and it does not *stricto senso* protect the interests of the respondent subject to the living apart provisions who may suffer hardship as a result of the divorce.

However, one may still argue that this section may operate as a limitation to the living apart provisions as it seems to refer to all proceedings for dissolution of marriage. A proactive counsel for a respondent may put this section to good use in a petition for

dissolution based on the living apart provisions. I daresay that learned counsel for Mrs. Bibilari may have had better luck with this section than he did with the bars.

It may be argued that subjecting the living apart provision to the discretion of the court destroys the spirit of the provision and makes it a fault prone provision; this writer begs to disagree. Subjecting the living apart provisions to the discretion of the court to enable the court make adequate provision for the respondent will not render the provision fault prone, rather, it will ensure that the application of the rights of parties to a unilateral divorce does not detract from the interests of their spouses especially in circumstances where it is clear that the exercise of the petitioner's right may cause untold hardship to the respondent.

The writer therefore advocates for an amendment of the Act to incorporate the provisions of sections 1(2)(e) and 5 of the UK Act.

The writer further advocates that a procedure be adopted whereby a petitioner will be required to furnish proof that he/she had indeed tried to save the marriage. This will ensure that the interest of the institution of marriage as well as the moral fabric of society is protected.

The recommendations above if adopted will deter a recalcitrant party from abusing the living-apart provisions and hopefully, will encourage spouses to make an attempt at saving their marriages.

6. Custody in Matrimonial cases

The second and last issue raised in the *Bibilari* case revolved around the custody of the seven-year-old daughter of the marriage, Miss Durotimi Joy Bibilari. *Hewer v Bryant*[61] defined custody as embracing a bundle of rights or powers, which a parent has over a minor until he (the minor) comes of age.

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61 (1969) All E.R. 578, 585, C.A

Custody disputes typically arise upon the termination of marriage between spouses who simultaneously wish to take physical control of the child/children of the marriage. Over the years, inconsistent determination of custody disputes between parents had led the courts to try to determine factors which may be universally considered in the determination of the award of custody.

With the promulgation of the 1970 Matrimonial Causes Act, the most important factor to be considered by a court seized of proceedings with respect to the custody of a child became the best interests of the child. Section 71 of the Act provides:

> In proceedings with respect to the custody, guardianship, welfare, advancement of education of children of a marriage, the court shall regard the interest of those children as paramount consideration; and subject thereto, the court may make such orders in respect of those matters as it thinks proper'

Section 71 of the Childs Right Act, 2003 also provides thus:

> Where in any proceedings before a Court the custody or upbringing of a child or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall, in deciding that question, regard the welfare of the child as the first and paramount consideration.

From the above, it is clear that the law requires that courts consider the best interests/welfare of the child above all else in the determination of proceedings relating to the custody of a child. This position is also supported by case law. In the case of *Williams v Williams*,[62] the court in a bid to adequately define the term

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62 (1987) 2 NWLR (pt. 54) p. 66 SC.

welfare set out several factors which taken together ensure the welfare of a child. These factors have become guiding principles in the determination of the constituents of welfare of the child in custody cases. They include adequate arrangement for the accommodation of the child,[63] keeping brothers and sisters together,[64] adequate arrangement for the advancement of education[65] and religion of the child, age[66] and sex[67] of the child, emotional attachment of the child to a particular parent,[68] wishes of the child,[69] conduct of the parties,[70] personality and character of the claimants.[71]

In *Bibilari's* case, Counsel for the Petitioner, Dr. Bibilari contended that Mrs. Bibilari abandoned the child when she was merely eight months old, making her unfit to have custody of the child. In her defence, Counsel for Mrs. Bibilari stated that Mrs. Bibilari had tried unsuccessfully to obtain an entry visa into the United Kingdom for the eight month old and as a result travelled without the child, to obtain medical treatment. She found upon her return that Dr. Bibilari had moved out of their matrimonial home and taken the children, including the eight month old, with him. He further stated that she made frantic efforts to retrieve the child from her husband, travelling to Ibadan, Oshogbo and Abuja in search of the child and that the Petitioner had denied her access to the child till date. She also accused Dr. Bibilari of having married another woman who lived with and bore children for him, to which

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63 *Dawodu v Dawodu* (1976) CCHCJ 1207.

64 *Nzelu v Nzelu* (1997) 3NWLR (pt. 494) p. 472.

65 Above note 62.

66 *Oladetohun v Oladetohun* Unreported Suit No HD/111/70 of 6 July, 1971.

67 *Oyelowo v Oyelowo* (1982) NWLR (pt. 239) p. 247.

68 *Okafor v Okafor* (1976) 6 CCHCJ 1927.

69 *Adu v Adu* (1978) 4 CCHCJ 569.

70 *Okafor v Okafor*, *id.; Afonja v Afonja* (1971) 1UILR 105.

71 *Olakojo v Olakojo* Suit No HOY/23/73, High Court of Western State, Oyo Judicial Division, delivered on 11 March 1974.

the Petitioner responded that he had not remarried, rather, he had several girlfriends and several children as a result.

Both parties sought to prove to the court that they were better able than the other party to take adequate care of the child. Mrs. Bibilari placed before the court a detailed plan for the advancement of the education of the child if she was granted custody, Dr. Bibilari failed to do this, however, he sought to show that the child had lived with him for the past seven years and he had taken good care of her so far. It is worthy of mention at this point that the child was not brought before the court to ascertain the veracity of this statement or at least to allow the court form an opinion as to the child's state of well-being. Both parties also adduced sufficient evidence to show their financial ability to adequately provide for the child.

In the determination of the issue of the custody of the child, the court made reference to Section 71 of the Act as well as the definition of welfare as found in the case of *Williams v Williams*[72]in holding that: [73]

> The term 'welfare' is composite of many factors, such as emotional attachment to a particular parent (whether mother or father), the adequacy of facilities such as educational, religious or opportunities for proper upbringing.

In particular, the court considered the following factors:

6.1 Age and Sex of the Child

Courts have usually taken the position that female children[74] should remain with their mothers while male children should

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72 Above note 62 at p.75.

73 Above note 19 at p. 11.

74 Above note 62.

remain with their fathers.[75] Following Oputa JSC in his judgment in the case of *Williams v Williams*, the court here found that female children need their mothers especially in their formative years and this was an important factor to consider in the award of custody. The court held:[76]

> His lordship, Oputa, JSC opined at p. 92 of the Report that "there are periods in a girl's life when she is undergoing the slow advance to maturity, when she needs her mother to discuss and answer her many questions about herself, her development, both physiological and psychological." I reckon that the above observation applies with equally force to Durotimi who is presently seven years old and will need her mother to discuss and answer her many questions about herself when her slow advance to maturity sets in a few of years from now.

Courts have also found that custody of sickly children or children of a tender age should be granted to the mothers.[77] In *Oladetohun*'s case, this rule was applied and a juju-practicing wife was awarded custody of the child of the marriage because the child was three years old. However, this rule may not be followed where there is evidence before the court which shows that the mother may not adequately care for the child, as in cases of cruelty to the child, previous abandonment,[78] etc. The court found that Mrs. Bibilari's conduct was not such as to vitiate the application of this rule.[79]

6.2 Adequacy of Arrangements for the Child

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75 Above note 67.
76 Above note 19 at p. 17.
77 Above note 66.
78 *Lafun v Lafun* (1967) NWLR 101.
79 Above note 19 at p. 16.

The court also considered the ability of the parents to provide adequately for the child in terms of accommodation, education, etc, and it found that both parties had the financial wherewithal to adequately provide for the child. The court held: [80]

> The facts that have emerged in the evidence adduced before the court is that both parties have the wherewithal to provide for Durotimi.

The court further considered a document filed by the Respondent containing a detailed plan for the education of the child as well as the fact that the Petitioner had not submitted a similar document but had had care and control of the child for the past seven years. The court also rejected a document by the Petitioner that purported to describe his plans for Durotimi's maintenance, etc., but which was filed after close of plenary trial.

6.3 Keeping Siblings Together

The general position is that in the determination of the award of custody, siblings should be kept together, to ensure that they grow up together,[81] in the words of Enemo:[82] "to ensure that the family is not split up more than is necessary." The court however found this rule not to be absolute especially in the present case where there was a marked age difference between Durotimi and her brothers such that the objective of keeping siblings together to enable them grow up together, could not be said to be defeated. The court held:[83]

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80 *Ibid., at* p. 14.

81 Above note 60; *Wakeham v Wakeham* (1954) All E.R. 434 C.A. at 435.

82 Enemo, above note 2 at p. 363.

83 Above note 19 at p. 17.

> Since Durotimi is merely 7 years old, she is likely to adapt very easily and quickly into a new home with her biological mother, even as the fact of her not being in the same age bracket with her two brothers (who are now young adults) dislodges whatever consideration that could otherwise have been given to the fact and advantages of brotherhood and sisterhood when there is more than one child of the family.

6.4 Personality and Character of the spouses

The court also considered the personality and character of the spouse in a divorce case where custody is in issue with respect to their obvious effect on the moral upbringing of the child. The court, in respect of the case under review considered the fact that the Petitioner brazenly told the court that he had numerous girlfriends and several children from these girlfriends. He found this type of behaviour possibly detrimental to the moral upbringing of a girl-child. The court held: [84]

> What is more, the Petitioner gleefully told this court under cross-examination that he has many children because he has many girlfriends. Since 'welfare' is a composite term which entails a consideration of the moral and physical wellbeing of a child as well as the existence of opportunities for proper upbringing, would the Petitioner who has many children from his retinue of girlfriends be in a better position than the Respondent to bring up a girl child?

After considering the factors above, the court ordered, relying as well on the decision of *Williams v Williams*,[85] that joint custody be granted to both parents, awarding physical care and control of the child to the Respondent, Mrs. Bibilari, and the

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84 Above note 19 at p. 16.

85 Above note 62.

responsibility for the child's education and maintenance to the Petitioner.

7. Review of the decision on custody

Again, the court's analysis and judgment with regards to this issue show a sound and laudable interpretation and application of the law. The court's interpretation and application hitherto discussed were accurate and particularly laudable is the fact that the court took into consideration the personality and character of the parents and the possible effects on the moral upbringing of the child.

The need to consider the personality and character of parents is often sacrificed on the altar of the irrelevance of conduct of parties in the award of custody. Once parties prove that conduct of parties is irrelevant in the award of custody (except where grave and persistent) as custody is not awarded as a reward for good conduct or denied as a punishment for bad conduct,[86] they are quick to forget that conduct of such parents may adversely affect the moral upbringing of the child.

Oftentimes, the conduct of parties under examination are related to conduct to the other party to the marriage or conduct which may cause physical damage to a child; hardly is conduct which may affect a child's moral upbringing considered. At most, a faint effort at ensuring the continuity of religion for the child is attempted. In the case of *Olakojo v Olakojo*,[87] the court showed concern that the parents (as is the case in most custody cases) were more concerned with showing evidence of financial ability to provide for the child and made no mention of the provisions for the child's moral upbringing. In the words of Babasanya Craig, J:[88]

> I was not told what type of home and surroundings that parties intended to establish for the children … I must

86 *Okafor v Okafor*, above note 68.
87 Above note 71.
88 *Ibid.*

> emphasize that this aspect of a child's welfare is just as important as the financial aspect. A parent who is given custody must be deemed to have given an undertaking to the court to look after the child on behalf of both parents and this means that he becomes responsible to see that the child grows up as a decent well-mannered child and in healthy surroundings. In my view, this special duty calls for careful consideration on the part of the parent; it must be well-thought-out and completely implemented.

8. Conclusion

The unilateral divorce theory is fraught with disadvantages. One of such is that it enables parties who are bored with their marriage to simply walk away. The *Bibilari* case is a classic example where H, bored with his marriage attempted (at the trial court and appeal level) to divorce W claiming intolerability but failed, as he was unable to substantiate his claims. He simply waited for one more year, instituted another action relying on the living apart provisions and acquired the dissolution he sought. The fact that a recalcitrant party may take undue advantage of these provisions cannot be overemphasized.

One of the major arguments for the unilateral divorce theory is the fact that it circumvents the bitterness and rancour associated with the adversarial process created by the matrimonial offence theory. However, this provision also allows parties to simply walk away from marriages against the will of their spouses without trying to work at saving the marriage, sometimes after only six months of living apart.

Modern divorce legislation has therefore substituted one evil for another especially in countries like New Zealand, Canada and the United States which have completely abolished the matrimonial offence provisions, wholly adopted the unilateral divorce theory and are currently battling soaring divorce rates. Tightening divorce laws by ensuring longer separation periods,

granting the court the discretion to protect the interests of the respondent in cases of exceptional hardship and requiring parties to furnish proof of attempt to save their marriage will ensure that the dual interests of preserving the marital institution and ensuring rancour-free divorce proceedings are adequately satisfied.

Also, on the issue custody, it is commendable that the court in this case took into consideration the often neglected factor of the personality and character of the spouses in the determination of the custody of Durotimi Bibilari. This writer therefore hopes that subsequent cases involving custody of children will take cognizance of this factor.